IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant),

and

PAN-ATLANTIC STEAMSHIP CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX TO PETITION.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

MISCELLANEOUS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Elijah Reed, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on July 16, 1962.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 183 F. Supp. 69 (E. D. Pa., 1960) (Appellants' Appendix 58a). The opinion of the Court of Appeals for the Third Circuit is reported at 302 F. 2d 255 (*infra*, p. 17). The opinion of the Court of Appeals for the Third Circuit on the Petition for Rehearing is reported at — F. 2d — (*infra*, p. 24).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1962 (*infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Is a vessel in the possession and control of a demise charterer liable in rem for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control of the vessel, and if the demise charterer is also the stevedore-employer?

STATEMENT OF THE CASE.

The Trial Court found petitioner, a longshoreman engaged in the loading of the S. S. "Yaka", was injured due to the unseaworthiness of the vessel. The "Yaka" was owned by Waterman Steamship Corporation and at the time of the accident was demised by bareboat charter to Pan-Atlantic Steamship Corporation.

A Libel In Rem was filed against the S. S. "Yaka." The trial took place on January 4, 1960, before the Honorable Thomas J. Clary, who found the vessel to be unseaworthy. Accordingly, he ruled that the vessel was liable in rem to the petitioner and that Pan-Atlantic was liable

over to Waterman Steamship Corporation under the express terms of an indemnity agreement (183 F. Supp. 69).

On appeal, the Court of Appeals for the Third Circuit reversed the District Court. While affirming the finding of unseaworthiness, the Court below held that liability in rem could not arise in the absence of an underlying in personam liability of someone having an interest in the vessel. The Court reasoned that since neither the owner nor the employer was liable in personam to the injured employee, there was no underlying obligation which would give rise to an in rem recovery against the vessel. The Court refused to treat the vessel as a distinct juridical entity and in so doing specifically disagreed with the ruling of the Second Circuit in *Grillea v. United States*, 232 F. 2d 919 (2 C. A. 1956).

A petition for rehearing was denied, with Chief Judge Biggs and Judge Staley dissenting from the denial. Judge Biggs stated that the majority view was contrary to the reasoning of this Court in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928) and *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946), and opined further that the majority view which precluded an in rem obligation where there was no subsisting in personam obligation was untenable. Judge Staley dissented because of the majority's reliance on *Smith v. Mormacdale*, 198 F. 2d 849 (3 C. A. 1952). He felt that the *Smith* opinion, of which he was the author, was inapplicable to a case where the shipowner was not the employer.

This petition seeks a review of the decision of the Court of Appeals for the Third Circuit which reversed the judgment of the District Court.

ARGUMENT.

The Decision of the Court Below Is in Violation of the Concepts Set by This Court in Plamals v. Pinar Del Rio, 277 U. S. 151 (1928); Seas Shipping Company v. Sieracki, 328 U. S. 85 (1946) and It Is in Direct Conflict With the Decision of the Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 and Leotta v. S. S. "Esparta", 188 F. Supp. 168 (S. D. N. Y. 1960), Which Held That an Underlying in Personam Obligation Is Not Necessary to the Existence of In Rem Liability So That the Longshoremen's Compensation Act Cannot Affect Existing Rights In Rem Against the Vessel.

American maritime law has traditionally recognized the vessel as a personality independent and exclusive of its owners and operators. It is so completely a separate and distinct juridical entity that it may be sued, held liable, and financially answerable for its trespasses. This responsibility of a vessel for its own torts is exclusive and independent of other possible concurrent or jointly responsible parties.

This principle is explained through the historical development of the maritime law in America. In this regard, Benedict states:

> "The doctrine of the personality of the ship may be described as a fiction, but the fiction is rather in the mode of expression, than in the substance of the law. The principle is that one . . . who through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship. (Citing Kruass Bros. Lumber Co. v. The Pacific Cedar, 290 U. S. 117, 78 L. ed. 216; 54 Sup. Ct. 105) . . . The ship is so much an independent enterprise, a juridical

aggregate of rights and liabilities that her creditors virtually go shares in her; . . . A maritime lien is the necessary basis for every admiralty proceeding in rem. Such a lien is a right of property and not a mere matter of procedure:" 1 Benedict on Admiralty, pp. 17-18.

"Maritime liens differ from common law liens in a very important point. A common law lien is always connected with a possession of the thing; it is simply a right to retain. On the other hand, a maritime lien does not in any manner depend upon possession. It is a right affecting the thing, and giving a sort of proprietary interest in it, and a right to proceed against it, to recover that interest." 1 Benedict on Admiralty, p. 24.

The independent liability of a ship has been established against various factual backdrops. Thus, a good-faith purchaser of a vessel may have his ship arrested and sold even though he is subject to no in personam liability since the maritime lien adheres to the property. See *The Bold Buccleugh*, 7 Moore P. C. 267 (1861); 1 Benedict, Admiralty, page 25. A vessel under a bareboat charter is liable in rem to an injured party, despite the lack of control on the part of the owner. *The Barnstable*, 181 U. S. 464 (1901); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951). Ships have been forfeited for statutory violations even though there has been no privity or knowledge on the part of the owner. *The Little Charles*, 26 Fed. Cases 979, Case No. 15,612 (C. C. D. Va. 1819); *The Malek Adhel*, 43 U. S. (2 How. 210 (1844)).

Mr. Justice Holmes, in The Common Law, drew from the case of *The Ticonderogo* (Swabey 215, 217) to illustrate the liability of a vessel in rem under charter for collision damages even though the vessel owner could not be held liable for said damage and from *The China*, 74 U. S.

(7 Wall.) 53 (1869), wherein this Court held the vessel liable for collision damage even though she was under the control not of her owner, but of a pilot whose employment was compulsory under the laws of the port. See further *Logue Stevedoring Co. v. Dalzellance,* 198 F. 2d 369 (2 Cir. 1952).

By way of further illustration of the ship's personality, Chief Justice Marshall in *The Little Charles,* 26 Fed. Cases 979, 982, quoted with approval by Mr. Justice Story in *The Malek Adhel,* 43 U. S. (2 How.) 210 (1844), stated:

> "This is not a proceeding against the owner, it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the Master. The vessel acts and speaks by the Master. She reports herself by the Master. It is, therefore, not unreasonable that the vessel should be affected by this report. . . . The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing."

Perhaps the clearest exposition of the independent personality and liability of a vessel is found in the historical review by Mr. Justice Holmes in The Common Law pages 25 to 32, wherein it is stated:

> "A ship is the most living of inanimate things. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the Maritime Law can be made intelligible, and on that supposition they at once become consistent and logical." pp. 26-27.

This Court, speaking through Mr. Justice Reed, stated:

> ". . . Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court . . ." *Canadian Aviator Ltd. v. U. S.*, 324 U. S. 215, 224, 89 L. Ed. 901, 908 (1945). See also, *Atlantic Steamer Supply Co. v. The SS Tradewind*, 153 F. Supp. 354, 357 (D. Md. 1957).

Likewise, a vessel must respond in rem for damage caused during a demise charter. When this question first came before this Court, it was an accepted fact that *in rem* liability existed and the only issue indicated was whether the owner or demisee bore the ultimate responsibility under the charter party. *The Barnstable*, 181 U. S. 464 (1901). See also *Logue Stevedoring Co. v. Dalzellance*, 198 F. 2d 369 (2 Cir. 1952); *Davis v. M/V Esso Delivery No. 13*, 100 F. Supp. 285 (D. Md. 1951); *United States v. The Helen*, 164 F. 2d 111 (2 Cir. 1947).

Burns Bros. v. Central Railroad Co. of N. J., 202 F. 2d 910 (2 Cir. 1953) involved a parallel situation. In that case, libellant's barge was negligently injured by a car float owned by the Central Railroad of New Jersey, which was being operated by the Long Island Railroad. At that time Central Railroad was undergoing reorganization so that process in rem might not have been obtainable. After a decree in personam was rendered against Long Island, it went into reorganization. The libellant was then in the same position as the petitioner is here. Central had no in personam liability and Long Island had its liability limited. A subsequent suit in rem was permitted because a lien had arisen by the violation of a duty by one in control.

Further, even though a shipowner may not be liable in personam where the vessel is demised by a bareboat charter and the unseaworthiness arises after the demise,

the vessel itself is liable. Thus in *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U. S. 859, it was stated at page 796:

> "If the demisee becomes liable for breach of warranty of unseaworthiness, a maritime lien arises upon the ship securing the obligee. Regardless of whether such lien arises when the demisee becomes liable for other default, we cannot doubt that one does arise when, as here, the liability is imposed in lieu of a warranty of seaworthiness, and upon the theory that, even where there is such a warranty, the resulting liability sounds in tort. Since the lien extends to unseaworthiness supervening after delivery, as well as that already existing, the owner demisor, so far as his ship will answer, is initially subject to a larger liability than is subject to under the putative imposed liability, although in cases of supervening unseaworthiness the eventual loss would no doubt fall on the demisee."

In *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956) a longshoreman, injured aboard a vessel owned by the United States, but demised to his employer under a bareboat charter agreement, filed a libel in rem against the vessel. The unseaworthiness arose after the demise and, therefore, Judge Hand ruled that an in personam action could not lie against the owner of the vessel. Despite this lack of an underlying in personam liability, Judge Hand ruled that a maritime lien could be imposed upon the vessel. He stated that the claim based upon a maritime lien was upon a different cause of action from that which arose in personam. Thus, in a factual situation precisely the same as that at bar, the Second Circuit, speaking through Judge Learned Hand, could see no reason why the vessel could not be subjected to in rem liability in a situation where there was no underlying in personam liability. See also *Leotta v. The Esparta*, 188 F. Supp. 168 (S. D. N. Y. 1960).

The cases of *Latus v. United States*, 277 F. 2d 264 (2 Cir. 1960), and *Noel v. Isbrandtsen*, 287 F. 2d 783, by contrast further illustrate this point. Both cases involved vessels which were out of navigation. Accordingly, no warranty of seaworthiness could possibly arise. See *West v. U. S.*, 361 U. S. 118 (1959). Therefore, in both cases it was held that there could be no possible recovery in view of the fact that there was no duty breached. In *Latus*, Judge Hand stated that "a longshoreman might sue a ship in rem if he was injured by her unseaworthiness which no one denied." And in *Noel*, Chief Judge Sobeloff stated:

> ". . . It is one thing to hold that a conviction or liability in personam is not a condition precedent to the action in rem; it would be quite another to say that the vessel may be held accountable as an entity where there has been no violation of the warranty of seaworthiness or a breach of duty on the part of anyone."

Norris, in his Law of Seamen, summarizes the ruling case law as follows:

> ". . . The maritime lien gives the lienor a right of action against the vessel herself and ignores the owner personally. The ship is personalized. . . . A lien is given . . . and made on the strength of the vessel as security. *Thus the vessel can be held liable on a lien even though the owner may not be personally liable*, as a debt incurred on the credit of the ship by a charterer under a demise charter. The maritime lien, . . . has been created by law for the purpose of furnishing wings and legs to the vessel . . ." 1 Norris, Law of Seamen (1951), p. 462. (Emphasis supplied.)

In summary, therefore, under the American maritime law, a lien attaches against the vessel in cases of personal injury resulting from the vessel's torts and the vessel is the responsible personality and is itself held accountable for

the damages.[1] This liability arises independent of any liability of the owner and is not dependent upon or related to concepts of in personam liability

The sole basis for destroying the petitioner's maritime lien in the case at bar was the fact that the charterer was also the stevedore-employer, whose exclusive liability to its employees was circumscribed by the Longshoremen's and Harbor Workers' Act. In concluding that there was no in rem liability without a correlative in personam liability, the Court below relied upon the case of *Smith v. The Mormacdale*, 198 F. 2d 849 (3 Cir. 1952), and ignored the dictates of this Court in *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928), and *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946).

It was in the *Pinar del Rio* case that this Court laid down the rule that a maritime lien must precede any *in rem* liability of a vessel. There, the plaintiff, a seaman, sued the vessel in rem under the Jones Act, 46 U. S. C. A. 688. This Court held that since the Jones Act did not expressly create a lien against the vessel, none could be inferred and, therefore, no action in rem could exist under that legislation. The Court ruled, however, that the seaman did have two avenues of approach: an action *in personam* against the employer under the maritime law as modified by the Jones Act, or his existing action *in rem* against the vessel under the general maritime law which provided the necessary lien which remained unaffected by the Jones Act. It

1. *The Palmyra*, 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531 (1827); *U. S. v. Malek Adhel*, 43 U. S. (2 How.) 210, 11 L. Ed. 239 (1844); *The China*, 74 U. S. (7 Wall.) 53, 19 L. Ed. 67 (1869); *The John G. Stevens*, 170 U. S. 113, 42 L. Ed. 969 (1898); *The Barnstable*, 181 U. S. 464 (1901); *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 760 (1903); *Canadian Aviator, Ltd. v. U. S.*, 324 U. S. 215, 89 L. Ed. 901 (1945); *Cannella v. Lykes Bros. Steamship Co.*, 174 F. 2d 794 (2d Cir. 1949); *Carbon Black Export, Inc. v. S. S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958); *Crumady v. J. H. Fisser*, 358 U. S. 423, 3 L. Ed. 2d 413; 1 *Benedict on Admiralty*, 17 et seq.; *Gilmore and Black, The Law of Admiralty*, Chap. IX (3), p. 494; 1 Norris, *Law of Seamen* (1951), p. 462; *Robinson on Admiralty* (1939), pp. 364, 312.

was reasoned that the new statute, not expressing a change in existing rights, could have no effect upon them.

The Longshoremen's Act similarly created an *in personam* liability for compensation against the employer without creating any right of lien against the vessel. Just as the Jones Act, it left unchanged any already established lien rights. It gave the longshoremen new statutory rights against his employer *in personam* and gave the latter a defense against damage actions *in personam*. Thus, the rights of the longshoremen, except as limited by statute, remain unaffected either "by construction, analogy or inference" (cf. *The Pinar del Rio*, U. S. at 156, L. Ed at 829). Accordingly, the longshoreman, as the seaman, may invoke his remedy against the ship under the general maritime law or they may make claim against their employers under the Compensation Act. Thus, as the Jones Act, which applied to the employer-employee relationship, has no effect upon the seaman's right *in rem* against the vessel, neither does the Longshoremen's Act affect the longshoreman's right in that regard. The *Pinar del Rio* treated the vessel as a separate and distinct legal entity.

Subsequently, in *Seas Shipping Co. v. Sieracki*, 328 U. S. 50 (1946), the Supreme Court reconfirmed the continuation of these rights. The Court said at 102:

> "We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer . . . But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against their persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone."

It must be noted that the Supreme Court in *Sieracki* limited the effect of the Longshoremen's and Harbor

Workers' Act to the employer alone. In recognizing the continued existence of all prior rights other than against the employer, this Court cited with approval *The Pacific Pine*, 31 F. 2d 152, 155 (W. D. Wash. 1929) which held that the ship is a third person against whom the longshoreman may bring his libel in rem.

It was the recognition of this line of authority by Chief Judge Biggs which caused him to state:

> "The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals v. The Pinar Del Rio, 277 U. S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946). A bare-boat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoreman the very important protective waranty of seaworthiness and limits Sieracki greatly."

The Court below placed its prime reliance upon its prior decision in *Smith v. The Mormacdale*, 198 F. 2d 849 (3 Cir. 1952). An analysis of that opinion indicates its total inapplicability to the factual situation at bar. The Court in *Smith* decided a case where the vessel was the property of the employer and held that in such an action, the suit against the vessel was really against the employer who was protected from liability by the Longshoremen's Act. In *Smith*, the Court of Appeals for the Third Circuit made it abundantly clear that only where the shipowner was also the employer did that statute lend its protective

cloak. That this is the true analysis of the *Smith* case is necessarily buttressed by Judge Staley's dissent from the denial of rehearing in the case at bar. Judge Staley, the author of the opinion in *Smith*, dissented in this case because he felt the concept set forth in *Smith* should not apply to a case where the employer was not also the shipowner.

In the instant case, the Court has applied *Smith* to a situation where the employer is not the shipowner, but a bareboat charterer. It felt that the distinction was not significant in view of the fact that demisee acquired control of the vessel. However, the demisee does not acquire ownership of the vessel. The owner retains his title and his pecuniary interest in the vessel and its operation. See *Guzman v. Pichirilo*, 369 U. S. 895 (1962). He continues to have the obligation that the vessel be seaworthy as this obligation remains non-delegable, continuing, and the shipowner is not relieved thereof by giving up control of the vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

The mechanism of a lease of the vessel does not destroy the interest of the owner nor his concomitant non-delegable obligations. The owner's interest remains and so does the longshoreman's right of lien against the vessel of which the owner holds title. The distinction between a charterer-employer and an owner-employer is both significant and substantial. The charterer may take the owner's control, but not his ownership and related obligations. Ownership *pro hac vice* does not involve passage of title nor does it require the vessel to be returned to the rightful owner free of lien. Significantly, the demise does not make the longshoreman the employee of the owner.

Nor is it material that the employer may ultimately have to pay. Ultimate payment in this case arises out of a contract of indemnity between the shipowner and the charterer-employer. As the liability over is traceable to the contract, Pan-Atlantic cannot realistically argue that this in rem action against the vessel is an action against

itself. It cannot raise the exclusive protection of the Compensation Act to offset its contracted-for liability which it has voluntarily and clearly assumed. While the defense of a Compensation Act is a personal defense of Pan-Atlantic, it must be remembered that Pan-Atlantic is not being sued, its vessel is not liable for the damages, and its reimbursement to the vessel for unseaworthiness which may have arisen during the demise is immaterial to the case at hand. See *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 350 U. S. 124 (1956). It was there contended that since the employer's obligation was exclusive under the Compensation Act, the employer could not be bound to pay ultimately. Mr. Justice Burton concluded that the exclusive liability provision of the Compensation Act did not protect the employer against claims based on contractual rights of indemnification. See also *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (3 Cir. 1953).

Yet, several of the Justices of this Court were reluctant to concur in *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 350 U. S. 124 (1956), for fear that the placing of ultimate responsibility on the stevedore on the basis of breach of warranty of workmanlike performance would vitiate the underlying basis for the unseaworthiness doctrine as expressed in *Sieracki*. When the protective scope of the unseaworthiness doctrine was broadened to include longshoremen, this Court observed:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within

the scope of its policy." *Seas Shipping Co. v. Sieracki*, supra, 328 U. S. 85 at page 100.

Since it is clear that compensation statutes were enacted to enlarge workers' rights, not diminish them, we fail to see how the combination of a demise charterer and stevedore-employer relationship can purge the owner of his non-delegable duties and extinguish the worker's right and his lien.

In *Guzman v. Pichirilo*, 369 U. S. 895 (1962), this Court expressly left open the issue of whether "a charter party relieves the owner of his traditional duty to maintain a seaworthy vessel" and "whether the vessel could be held liable in rem when neither the demisee nor the owner was personally liable." In that case certiorari was granted to determine the conflict on that point between the Courts of Appeals of the First and Second Circuits. This Court, in Note 2 cited to the text in *Pichirilo*, specifically referred to the decision in *Reed v. The Yaka* and stated that the Court of Appeals for the Third Circuit "had aligned itself *in toto* with the position of the Court of Appeals for the First Circuit." Accordingly, the need to resolve the conflict between the Courts of Appeals still exists. See *Grillea v. U. S.*, 232 F. 2d 919 (2 Cir. 1956).

Further, if the doctrine of *Sieracki* is to remain viable, this Court must correct the ruling of the Court of Appeals for the Third Circuit and adopt the reasoning of the Court of Appeals for the Second Circuit which imposed in rem liability upon the vessel in situations identical with the one presented on this appeal.

The mechanism of a bareboat charter in cases like the present is a deprivation of a longshoreman's right to a seaworthy vessel. The decision of the Court of Appeals for the Third Circuit permits the owner to insulate himself by a charter and the charterer to protect himself by pleading immunity under the Longshoremen's Act. This deprivation of the protective warranty of seaworthiness conflicts with the principles enunciated by this Court in

Sieracki and *The Pinar del Rio.* It conflicts with the decision of Judge Hand in *Grillea.* It permits the shipowner to deny his continuing and non-delegable duty by a simple device that has been common and is becoming more prevalent. The application of the decision of the Court below makes it unnecessary for a stevedore to be presented with a safe and seaworthy vessel for the combination of the Longshoremen's and Harbor Workers' Act and the demised charter will insulate all parties from liability.

The present decision is such a sharp departure from historically recognized principles of maritime law and so contrary to the characteristic features and humanitarian policies thereof that it should not be permitted to stand without further examination by this Court. It is based on the erroneous view that under the maritime law an action against a vessel is an action against its owner. It literally uproots and overturns the concept of the ship's personality as a distinct juridical entity.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED, *Appellee,*

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

Appellant in No. 13,600,

AND

PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellant in No. 13,601.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 18, 1961
Before: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 27, 1962)

By HASTIE, *Circuit Judge.*

Libellant Reed, the appellee here, is a longshoreman who was injured while employed by appellant Pan-Atlantic

Steamship Corporation and engaged in loading the steamship Yaka. The accident occurred in the hold of the ship when a wooden pallet upon which Reed was standing broke. The pallet was part of staging which the longshoremen themselves had brought on board the ship and had erected.

The libel was solely in rem against the Yaka. The ship was and is owned by Waterman Steamship Corporation, which, as owner and claimant, has defended this libel. However, at the time of the accident in suit the ship had been demised to and was being operated by Pan-Atlantic Steamship Corporation as a bareboat charterer. This libel was instituted after the expiration of the demise and the return of the ship to its owner.

The libel was filed in the Eastern District of Pennsylvania at a time when the Yaka was not within that jurisdiction. However, Waterman answered the libel on its merits averring that it "voluntarily appeared as claimant to avoid attachment and delay of the vessel if it should subsequently be present" within the jurisdiction. Waterman also impleaded Pan-Atlantic as the demisee of the ship at the time of the accident, alleging that Pan-Atlantic was obligated to indemnify the ship and its owner for any loss they might suffer as a result of the principal claim.

A trial on the question of liability resulted in a permissible finding that libellant's injury had been caused by an unseaworthy condition created by Pan-Atlantic's employees during the demise. 1960, 183 F. Supp. 69. The court then concluded as a matter of law that, although the Longshoremen's and Harbor Workers' Act prevented Pan-Atlantic from being liable to its employee Reed for breach of warranty of seaworthiness, the ship was nevertheless accountable in rem for the injuries caused by its unseaworthiness. At the same time, liability over was imposed upon Pan-Atlantic. Both Waterman, on behalf of the Yaka, and Pan-Atlantic have appealed.

On this appeal, it is argued for the first time that jurisdiction in rem never attached in this case because the

ship was never arrested and no bond or stipulation for value was ever filed.[1] The second and more fundamental contention of both appellants is that the accident did not and could not subject the ship to any liability in rem because it did not create any personal liability against anyone having an interest in the ship.

The first point requires only brief analysis. While the power of an admiralty court to exercise authority over a ship normally depends upon the arrest of the ship within the court's territorial jurisdiction, a claimant can waive this requirement and consent to jurisdiction so far as its interest in the vessel is concerned. *The Willamette*, 9th Cir. 1895, 70 Fed. 874. See generally 2 BENEDICT, ADMIRALTY, Knauth ed. 1940, § 242. A recent decision of the Supreme Court, *Continental Grain Co. v. Barge FBL-585*, 1960, 364 U. S. 19, is instructive. In that case a ship was beyond the jurisdiction of the court when a proceeding in rem was filed against it. However, the owner, as claimant, gave the libellant a "letter undertaking" stipulating that the rights of the parties would " 'for all purposes be . . . precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* processes, and released by the filing of claim and release bond . . . .' " Id. at 29. The Supreme Court treated this submission as perfecting the jurisdiction of the court. We think the voluntary appearance of the claimant to respond to the libel on its merits in this case was an equivalent and equally effective undertaking that its interest in the ship should be subject to the authority of the

1. This contention is advanced by Pan-Atlantic, which had no interest in the Yaka when this proceeding was instituted against the ship. Waterman, the owner then in possession, has not challenged the venue. In these circumstances, while we shall consider the issue on its merits, the standing of Pan-Atlantic to raise it is at least doubtful. Compare *Ryan Stevedoring Corp. v. Pan-Atlantic S. S. Corp.*, 1956, 350 U. S. 124, where it was made clear that the third-party defendant's rights and duties must be viewed independently of the legal relationship between the longshoreman and the shipowner.

court. *Cf. United States v. Ames*, 1879, 99 U. S. 35; *J. K. Welding Co. v. Gotham Marine Corp.*, S. D. N. Y. 1931, 47 F. 2d 332.

We come now to the basic contention that the imposition of liability on the ship was improper because the accident in suit gave rise to no personal liability.

A similar question was carefully considered and decided by this court in *Smith v. The Mormacdale*, 1952, 198 F. 2d 849, *cert. denied*, 1953, 345 U. S. 908. There the owner and operator of a ship employed a stevedore who was injured as a result of the unseaworthiness of the vessel. Since the Longshoremen's and Harbor Workers' Act, in establishing a workmen's compensation scheme, deprived an injured employee of all other rights against his employer, the injured longshoreman took no action against the shipowner but libeled the ship, claiming that it was directly and independently liable in rem for the consequences of its unseaworthiness. However. this court described such a proceeding against the ship itself as merely a procedural device of admiralty for more readily effectuating the liability of some jural person who has breached some personal obligation, in that case the absolute duty that the law imposes upon a shipowner to maintain a seaworthy vessel. We looked through the fiction of "the so-called independent personality of the ship" and recognized that "an action against the vessel is realistically an action against" the owner, 198 F. 2d at 850. Analytically, there had to be a preexisting maritime lien upon which to base the remedy of recovery from or through the ship, and since the owner-employer was not liable to its injured employee, there was no underlying obligation that could have given rise to such a lien. Accord, *Samuels v. Munson S. S. Line*, 5th Cir. 1933, 63 F. 2d 861; *cf. Continental Grain Co. v. Barge FBL-585*, *supra*. See generally GILMORE & BLACK, ADMIRALTY, 1957, 483-510.

The case at hand is different only in that the suing longshoreman's employer was a bareboat charterer rather than

an owner. But for present purposes that is not a significant distinction. In admiralty such a demisee acquires full control and authority over the ship and the rights and duties which attend such dominion. He takes the owner's place for the term of the demise. *United States v. Shea*, 1894, 152 U. S. 178; *Leary v. United States*, 1871, 81 U. S. (14 Wall.) 607, 610 (dictum); GILMORE & BLACK, *op. cit. supra* at 215-16. Thus, the doctrine of *Smith v. The Mormacdale* is applicable to this case and prevents the present libellant from recovering against the Yaka unless someone other than his employer breached a duty to provide longshoremen with a seaworthy ship.

The only other person who was even arguably so obligated is Waterman. Unquestionably, as owner, Waterman warranted the seaworthiness of the vessel as transferred to the bareboat charterer. *Work v. Leathers*, 1878, 97 U. S. 379. Indeed, the charter so provided. But the unseaworthiness here resulted solely from the subsequent conduct of the demisee's employees in bringing a defective appliance on to the ship. The Court of Appeals for the Second Circuit has recently considered this very problem and has ruled, correctly we think, that an owner is not liable for unseaworthiness, originating and causing injury while a demisee is operating a ship. To that court it seemed neither fair to the demisor nor necessary to protect those who should deal with the ship during the term of the charter that this type of liability without fault should "extend beyond the demisee, on whose initiative and for whose profit the venture had been undertaken . . . [to] include the demisor, who has done no more than put the demisee into possession of the ship . . . ." *Grillea v. United States*, 2d Cir. 1956, 229 F. 2d 687, 690. We think this position is sound and, therefore, that libellant cannot base his action on any warranty by Waterman that its demisee would not bring aboard unseaworthy appliances.

Thus, analyzed, this suit is an attempt to use the procedural device of a libel in rem against a ship for injury

caused by its unsafe condition in the absence of any underlying obligation of anyone to respond in damages for breach of warranty of seaworthiness. In essence libellant is asserting that a maritime lien has arisen in his favor though he cannot show any lien-creating obligation. In these circumstances, we think the libellant was not entitled to recover.

We recognize that a contrary result has been reached by the Court of Appeals for the Second Circuit. *Grillea v. United States*, 232 F. 2d 919. It seems to us, however, that this result was achieved by incorrectly treating the fictional personification of the ship as something more than the procedural device that it is. The same problem subsequently came before the Court of Appeals for the First Circuit in *Pichirilo v. Guzman*, 290 F. 2d 812, cert. granted, 1961, 368 U. S. 895. Disagreeing with Grillea, that court reasoned as we do that the absence of any lien-creating personal obligation of the demisor or the demisee precluded any recovery against the ship in rem.

The judgment will be reversed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600; 13,601

ELIJAH REED

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),

Appellant in No. 13,600;

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Appellant in No. 13,601.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest:
IDA CRESKOFF
Clerk

April 27, 1962

Received and Filed
Apr 27 1962
Ida O. Creskoff,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,600 and 13,601

ELIJAH REED,
Appellee

v.

STEAMSHIP YAKA, HER ENGINES, BOILERS, MACHINERY, ETC. (WATERMAN STEAMSHIP CORPORATION, OWNER AND CLAIMANT),
Appellant in No. 13,600

and

PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellant in No. 13,601.

Present: BIGGS, *Chief Judge;* and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges.*

OPINION OF THE COURT ON PETITION FOR REHEARING.

(Filed July 16, 1962)

PER CURIAM:

The petition for rehearing presents nothing of significance that was not fully considered in deciding this appeal.

The petition is denied.

BIGGS, *Chief Judge*, dissenting.

The majority view that no *in rem* obligation came into existence because there was no subsisting *in personam* obligation is untenable. The majority view seems to be contrary to the reasoning of the Supreme Court in Plamals

v. The Pinar Del Rio, 277 U. S. 151 (1926), and Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946). A bare-boat charter cannot insulate the ship owner from liability. The Supreme Court again and again has held that the ship owner has a non-delegable absolute duty to maintain the vessel in a seaworthy condition. A charterer under circumstances such as those at bar does not gain immunity because of the Longshoremen's and Harbor Workers' Compensation Act. I think the case is wrongly decided for it takes away from the longshoremen the very important protective warranty of seaworthiness and limits Sieracki greatly.

But quite aside from the foregoing, the Supreme Court in Guzman v. Pichirilo, 369 U. S. 698 (1962), expressly left open the issue of whether "a charter party relieves the owner of his traditional duty to maintain a seaworthy vessel." Moreover, the Supreme Court in note 2 cited to the text in Pichirilo specifically referred to our decision in the instant case and stated that we "had aligned ourselves in toto with the position of the Court of Appeals for the First Circuit." See 290 F. 2d 812 (1961). I think that the importance of the case at bar justifies rehearing by the court en banc. I therefore must respectfully dissent from the order refusing to grant rehearing.

STALEY, *Circuit Judge*, dissenting.

I join Chief Judge Biggs in his conclusion in his dissent. I read his dissent as not disturbing Smith v. The Mormacdale, 198 F. 2d 849 (C. A. 3, 1952), where the employer was also the shipowner.